No. 80-993

In the Supreme Court of the United States

OCTOBER TERM, 1980

GENE PATTERSON, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction to review the Board's dismissal of an employee petition to decertify the incumbent union representative where the Board had determined that there were outstanding unfair labor practice complaints against the employer that precluded the holding of an election at that time.

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The opinion of the court of appeals (Pet. App. 34-38) is noted at 626 F. 2d 862 (table). The memorandum opinion of the district court (Pet. App. 39-42) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1980. On October 21, 1980, the Chief Justice granted an extension of time in which to file a petition for a writ of certiorari to and including December 17, 1980, and the petition was filed on December 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 28, 1974, the Board conducted a representation election among the production and maintenance employees of J.P. Stevens & Co. ("the Company"), at its seven plants in Roanoke Rapids, North Carolina. A majority of the employees voted for the Union,[1] and on September 6, 1974, the Board certified the Union as the exclusive bargaining representative of the unit employees.

On March 7, July 30, and October 3, 1975, the Union filed unfair labor practice charges with the Board's Regional Office, alleging in part that the Company had refused to bargain with the Union by making unilateral changes in wages and terms and conditions of employment (A. 21-23).[2] On June 1, 1976, following investigation of these charges, the General Counsel of the Board issued three complaints charging the Company with violating the Act by negotiating with the Union in bad faith and with no intent to reach

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[1]Textile Workers Union of America, subsequently succeeded by the Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC.

[2]"A." refers to the appendix to the briefs in the court of appeals. References to the record herein are taken from the Board's brief in the court of appeals.

an agreement; unilaterally changing policies governing wages and terms and conditions of employment; refusing to furnish information requested by the Union for use in performing the Union's collective bargaining responsibilities; threatening employees; and discharging an employee because of her union activity (A. 24-31). The complaints were consolidated and a hearing was conducted before an Administrative Law Judge between December 1976 and April 1977. After the hearing commenced, the Union filed an additional charge, and the General Counsel issued another complaint that was consolidated with the pending complaints (A. 32-36).[3]

On November 18, 1977, subsequent to the hearing on the consolidated complaints, petitioners filed a petition with the Regional Director seeking to decertify the Union on the ground that a substantial number of unit employees no longer wished the Union to be their representative (A. 18A). On November 29, 1977, the Regional Director dismissed the decertification petition because, as stated in a letter to petitioners (A. 18G):

> The investigation reveals that there is an unfair labor practice charge pending before an Administrative Law Judge alleging the Employer has violated Section 8(a)(5) of the Act by refusing to bargain in good faith with its bargaining representative, therefore, no question concerning representation can exist and thus, the

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[3]The Union filed additional unfair labor practice charges against the Company on October 25, 1977, alleging further refusals to bargain by the Company. The General Counsel issued a complaint based on this charge, as amended, on March 22, 1978 (A. 38-41).

> petition is dismissed. This case is subject to reinstatement, if appropriate, upon application by the Petitioner, after disposition of the unfair labor practice proceeding.[4]

Petitioners appealed the Regional Director's decision to the Board, which, on January 5, 1978, denied the appeal.[5]

On November 14, 1978, petitioners filed the present suit in the United States District Court for the Eastern District of North Carolina, seeking review of the Board's ruling dismissing the decertification petition and an order compelling the Board to process the petition. The Board moved

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[4]The "blocking charge" policy, pursuant to which the Regional Director acted, is set forth in the National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings (1975), which states in relevant part:

> 11730 Concurrent R and C Cases
>
> The Agency has a general policy of holding in abeyance any representation case (RM, RC, or RD) or union deauthorization cases (UD) where pending unfair labor practice charges filed by a party to the R or UD cases are based upon conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election, were one to be conducted on the petition (e.g., *United States Coal & Coke Company*, 3 NLRB 398, 399; *Carson Pirie Scott & Company*, 69 NLRB 935, 938-939; *Columbia Pictures Corporation, et al.*, 81 NLRB 1313, 1314; see also *Holt Bros.*, 146 NLRB 383, 384).
>
> Where the pending charges allege violations of 8(a)(2), 8(a)(5), 8(b)(3), or 8(b)(7), such a policy also applies even where the person filing the charges is not a party to the R or UD case, and the petition may ultimately be dismissed, since the nature of the alleged violations of those sections of the Act and the remedies which could be provided therefor, might condition or preclude the existence of the question concerning representation sought to be raised by the petition (e.g., *Big Three Industries, Inc.*, 201 NLRB 197). * * *

[5]On December 21, 1977, while the appeal was pending, the Administrative Law Judge issued a decision in the consolidated unfair labor practice cases finding that, since October 31, 1974, the Company had

to dismiss under Fed. R. Civ. P. 12 on the grounds that the district court did not have jurisdiction over the subject matter of the suit and that the complaint failed to state a claim upon which relief could be granted. Alternatively, pursuant to Fed. R. Civ. P. 56, the Board moved for summary judgment. The district court dismissed the complaint (Pet. App. 39-42), holding that a federal district court has no subject-matter jurisdiction over a Board dismissal of a decertification petition based upon outstanding unfair labor practice complaints. The court found that the Board "has not acted beyond its delegated powers; rather, it has exercised discretion specifically entrusted to it * * *[and has not] applied the blocking charge rule with a mechanistic *per se* approach" (*id.* at 41).

The court of appeals, in a *per curiam* opinion (Pet. App. 34-38), affirmed the district court's dismissal of the complaint for lack of jurisdiction. The court stated (*id.* at 38) that the

> District Court accurately adjudged that [in dismissing the petition because of the pending unfair labor practice charges] in this case, the Board neither exceeded

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refused to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act. The ALJ further found that the Company violated Section 8(a)(5) and (1) of the Act by making unilateral changes in terms and conditions of employment and by refusing to furnish relevant information requested by the Union. The ALJ issued a recommended order requiring the Company to bargain with the Union in good faith and deeming the Union's certification as commencing on the date the Company began bargaining in good faith.

The Board issued its Decision and Order affirming the ALJ's findings, conclusions, and order on December 12, 1978. *J. P. Stevens & Co.*, 239 N.L.R.B. 738. The court of appeals enforced the Board's order in relevant part on June 11, 1980. *J. P. Stevens & Co.*, v. *NLRB*, 623 F. 2d 322 (4th Cir. 1980).

its authority nor ignored any statutory exaction; rather, its [action] * * * was an exercise of the discretion delegated to the Board by Congress.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or the law in any other circuit. Accordingly, further review is unwarranted.

1. Petitioners argue (Pet. 22-23) that the district courts have jurisdiction to review Board representation decisions that do not result in unfair labor practice proceedings reviewable in the courts of appeals. This contention is without merit.[6]

The National Labor Relations Act does not provide for direct review of Board determinations in representation proceedings, but permits review of such determinations only to the extent authorized by Section 9(d) of the Act, 29 U.S.C. 159(d), *i.e.*, when they form the basis for a final order issued in an unfair labor practice proceeding and that order is before the court of appeals for enforcement or review under Section 10(e) or (f) of the Act, 29 U.S.C. 160(e) or (f). See *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 409 (1940); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964); *May Department Stores Co.* v. *NLRB*, 326 U.S. 376, 379 (1945). The rule that a representation determination is not reviewable unless it "eventuates in a finding by the Board that an unfair labor practice has been committed * * *" (*Boire* v. *Greyhound Corp., supra*, 376 U.S. at 477) is more than a requirement that a party to a representation proceeding exhaust its administrative remedies before seeking judicial review. It reflects a policy

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[6]On February 23, 1981, this Court denied certiorari in a case presenting a similar claim. *Physicians National House Staff Ass'n* v. *Murphy*, No. 80-933.

choice by Congress to provide solely for *administrative* resolution of representation questions that do not ultimately result in an unfair labor practice proceeding.[7]

The legislative history of the Wagner Act of 1935 discloses that Congress, after balancing the advantages of permitting direct review of Board representation determinations against the disadvantages—especially the likelihood that direct review would result in dilatory tactics in representation proceedings—deliberately decided to preclude such review.[8] In 1939, Congress was asked to reconsider the question of direct review of Board representation determinations and declined to change the limited review provisions of the Wagner Act.[9]

The problem was again considered by Congress in 1947 when it enacted the Taft-Hartley amendments to the Act. Section 10(f) of the House bill, following the 1939 proposal, provided for direct review by the courts of appeals of Board certifications. H.R. Rep. No. 245, 80th Cong., 1st Sess. 43,

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[7]There is no doubt that Congress has the power to prescribe an administrative remedy to the exclusion of a judicial one. See *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 301 (1943) ("All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced"). See also *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960); *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318-319 (1958).

[8]See S. Rep. No. 573, 74th Cong., 1st Sess. 5-6 (1935), reproduced in 2 *Legislative History of the National Labor Relations Act of 1935*, at 2305 (1949) (hereinafter referred to as "2 *Leg. Hist.*"). See also H.R. Rep. No. 1147, 74th Cong., 1st Sess. 7 (1935); 2 *Leg. Hist., supra*, at 3053. See generally *Leedom* v. *Kyne*, 358 U.S. 184, 191-197 (1958) (Brennan, J., dissenting).

[9]See *Hearings on S. 1000, etc., Before the Senate Comm. on Education and Labor*, 76th Cong., 1st Sess., Pt. 1, 460-463, 584-585 (1939); *American Federation of Labor* v. *NLRB*, *supra*, 308 U.S. at 409-411; *Madden* v. *Brotherhood*, 147 F. 2d 439, 443-445 (4th Cir. 1945).

59-60 (1947), 1 *Legislative History of the Labor Management Relations Act of 1947*, at 334, 350-351 (1948) (hereinafter referred to as "*1 Leg. Hist.*"). The House Report accompanying the bill explained that such an amendment was desirable because, *inter alia*, the Act as then structured was unfair to "the union that loses, which has no appeal at all no matter how wrong the certification may be." H.R. Rep. No. 245, *supra*, at 43, 1 *Leg. Hist., supra*, at 334. In conference, this provision was eliminated, and Congress decided to retain the limited review provided in Section 9(d) of the original Act. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 56-57 (1947), 1 *Leg. Hist., supra*, at 560-561.

2. There is also no merit in petitioners' additional contention (Pet. 19-20) that the jurisdiction of the district court in this case can be sustained under *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

a. In *Leedom* v. *Kyne*, this Court carved out a limited exception to the general rule of nonreviewability of representation proceedings. There, jurisdiction of the district court was found to exist where the Board directed an election in an admittedly mixed bargaining unit of professional and non-professional employees without first having "a majority of such professional employees vote for inclusion in such unit" as expressly required by Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1). This Court explained that the district court had jurisdiction because the Board had acted in violation of a "clear and mandatory" provision of the statute, thereby depriving the professional employees of a right guaranteed them by the Act for which there was no other remedy. 358 U.S. at 190-191.

The Court has made clear that district court jurisdiction is narrowly confined to the situation where the Board acts in violation of a specific mandate of the Act and does not

extend to an action seeking review of discretionary determinations. Thus, as the Court emphasized in *Boire* v. *Greyhound Corp., supra*, 376 U.S. at 481:

> The *Kyne* exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals, and then only under the conditions explicitly laid down in § 9(d) of the Act.

See also *Brotherhood of Railway & Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 659-660 (1965).[10]

b. The Board did not violate a clear statutory mandate or otherwise exceed its statutory authority in dismissing the petition here pursuant to its "blocking charge" policy (see page 3 note 4, *supra*). Under Section 9(c) of the Act,[11]

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[10]Petitioners incorrectly rely (Pet. 28) on *Califano* v. *Sanders*, 430 U.S. 99 (1977), to support their contention that the district court had jurisdiction under 28 U.S.C. 1331. In that case, this Court recognized that the grant of jurisdiction to federal courts to review agency action under Section 1331 is "subject * * * to preclusion-of-review statutes created * * * by Congress" (430 U.S. at 105). As shown above, the manifest intent of Congress, from the time of enactment of the Wagner Act to the present, has been to preclude judicial review of Board representation determinations unless they form the basis of a final order issued in an unfair labor practice proceeding, which is reviewable in the courts of appeals under Section 10(e) and (f) of the Act; thus, the Act precludes district court jurisdiction under Section 1331.

[11]Section 9(c)(1) provides in pertinent part (emphasis added):

> Whenever a petition shall have been filed * * * the Board shall investigate such petition and *if it has reasonable cause to believe that a question of representation affecting commerce exists* shall provide for an appropriate hearing upon due notice. * * * If the

29 U.S.C. 159(c), the Board, upon the filing of a decertification petition, is authorized to determine whether a question of representation exists, and, if it so finds, it is directed to hold an election. See *Lawrence Typographical Union* v. *McCulloch*, 349 F. 2d 704, 707 (D.C. Cir. 1965); *Surprenant Mfg. Co.* v. *Alpert*, 318 F. 2d 396, 399 (1st Cir. 1963); *Furr's, Inc.* v. *NLRB*, 350 F. 2d 84, 85-86 (10th Cir. 1965). Whether a question conerning representation exists "is essentially a factual issue" (*Modern Plastics Corp.* v. *McCulloch*, 400 F. 2d 14, 19 (6th Cir. 1968)) and, in determining that issue, the Board has discretion to establish appropriate criteria. *Lawrence Typographical Union* v. *McCulloch, supra*, 349 F. 2d at 707.

The Board's general policy of not proceeding to an election in the face of outstanding unfair labor practice charges is a reasonable exercise of the Board's discretion to determine whether a representation question is presented that can properly be resolved under the Board's election machinery. The commission of serious unfair labor practices, including an employer's refusal to bargain, can undermine the union's representative status and render impossible an election reflective of the employees' true and undistorted preferences. See NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704 (1944). Moreover, the usual remedy for a refusal-to-bargain violation is to require the employer to bargain in good faith notwithstanding that the union may have lost its majority status. *Franks Bros. Co.* v. *NLRB, supra*, 321 U.S. at 704-705. And, in certain circumstances, an employer's refusal to bargain may warrant extending the union's "certification year"—the period during which the Board will refuse to conduct an election—for up to a year after good-faith

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Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

bargaining commences. See *Raynal Plymouth Co.*, 175 N.L.R.B. 527 (1969). See generally *Brooks* v. *NLRB*, 348 U.S. 96 (1954). In light of these considerations, the courts of appeals have upheld the Board's "blocking charge" policy. See *Bishop* v. *NLRB*, 502 F. 2d 1024, 1029 (5th Cir. 1974); *NLRB* v. *Big Three Industries, Inc.*, 497 F. 2d 43, 51 (5th Cir. 1974); *Furr's, Inc.* v. *NLRB, supra*, 350 F. 2d at 85-86; *Surprenant Mfg. Co.* v. *Alpert, supra*, 318 F. 2d at 397 (citing cases).[12]

Petitioners' reliance (Pet. 17, 20, 21) on *Templeton* v. *Dixie Color Printing Co.*, 444 F. 2d 1064 (5th Cir. 1971), is misplaced.[13] Subsequent decisions of the Fifth Circuit have confined *Templeton* to its exceptional facts. See *Bishop* v. *NLRB, supra*, 502 F. 2d at 1032; *NLRB* v. *Big Three Industries, Inc., supra*, 497 F. 2d at 53-54. Thus, in *Bishop*, the Fifth Circuit held that a complaint seeking to compel the Board to process a decertification petition was not within the district court's jurisdiction because, in dismissing the employee decertification petition after the Board's "General Counsel ha[d] found enough substance to the allegations to form the basis of a complaint," the Board was "well within

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[12]There is no merit to petitioners' contention (Pet. 14) that the policy is subject to attack because the Board did not utilize the formal rulemaking authority of the Administrative Procedure Act. In formulating agency policy, the Board may proceed by adjudication or rulemaking, and the choice of method lie within the discretion of the Board. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293 (1974); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969).

[13]In *Templeton*, the Fifth Circuit found that the Board had mechanically invoked its "blocking charge" rule and thereby violated the express command of Section 9(c)(1) of the Act, which provides that the Board "shall investigate" all decertification petitions. However, the only alleged unfair labor practice concerning a refusal to bargain in that case had occurred several years before the case reached the court of appeals and a period of actual collective bargaining had transpired. The only matters still in issue concerned the reinstatement of some striking employees, an issue that did not go to the heart of the bargaining relationship. The court further noted that the union was not pursuing its bargaining rights. 444 F. 2d at 1066-1067.

the boundaries of its statutory mandate" (502 F. 2d at 1032). In so holding, the Fifth Circuit emphasized that *Templeton* involved unusual circumstances and represented "a very limited exception to the general rule of review of representation questions" (*ibid.*).[14] Here, as in *Bishop*, the decertification petition was dismissed after the General Counsel had issued unfair labor practice complaints, and, indeed, after the Administrative Law Judge had issued a decision sustaining the allegations of the complaints.[15]

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[14] *Bishop* also limited to its facts the decision in *Surratt* v. *NLRB*, 463 F. 2d 378 (5th Cir. 1972). In *Surratt*, the Fifth Circuit held that district court jurisdiction existed where the Board applied the "blocking charge" policy even though good-faith bargaining had apparently taken place during most of the union's certification year and the union had filed its unfair labor practice charges only after the decertification petition was filed. 463 F. 2d at 380. Furthermore, by the time the matter reached the court, a Board hearing had been held on the blocking unfair labor practice complaints and the NLRB Administrative Law Judge had recommended dismissal of all the charges. *Ibid.*

[15] Petitioners' contention (Pet. 15) that the Board should have given greater emphasis to their claim that the "union conduct, and not management misconduct, caused the [decertification] petition" overlooks that the Regional Director had previously investigated and refused to issue complaints on charges filed by petitioners alleging that the Union violated Section 8(b)(1)(A) and (B) of the Act by instituting a boycott of Company products. See *J. P. Stevens Employees Educational Committee* v. *NLRB*, 582 F. 2d 326, 328 (4th Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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